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In the Court of Criminal Appeals
of Texas

FILED
COURT OF CRIMINAL APPEALS
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SAUL RANULFO HERRERA RIOS,
APPELLANT/PETITIONER,

v.

THE STATE OF TEXAS,
APPELLEE/RESPONDENT

On discretionary review of a decision by the
Court of Appeals, Fifth District at Dallas, Texas
In Cause No. 05-19-00297-CR

STATE'S RESPONSE BRIEF

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TO THE HONORABLE COURT OF APPEALS:

The State of Texas submits this brief in response to the brief of Appellant, Saul Ranulfo Herrera Rios.

STATEMENT OF THE CASE

A Dallas County grand jury indicted Appellant for continuous sexual abuse of a child under the age of fourteen. (CR: 8). Appellant entered a plea of not guilty before the trial court. (RR2: 10; CR: 38). At the conclusion of trial, the trial court found Appellant guilty of the charged offense and sentenced him to thirty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. (RR3: 28-29; CR: 38). Appellant filed a motion for new trial, which the trial court overruled. (CR: 42).

Appellant filed a notice of appeal with the Fifth District Court of Appeals at Dallas. (CR: 41). In September 2019, the court of appeals granted Appellant's motion to hold the briefing schedule in abeyance to allow the trial court to conduct an evidentiary hearing and make findings of fact and conclusions of law on the issues of alleged incorrect recitations in the trial court's judgment and the voluntariness of Appellant's jury waiver. (Supp. CR1: 41). Accordingly, the trial court held evidentiary hearings on October 3, October 25, and November 1, 2019, at which Appellant, his trial counsel, the trial prosecutor, and a probation department assessment officer testified.

The trial court issued findings of fact and conclusions of law, and the court of appeals reinstated the appeal. Thereafter, the parties filed briefs in the case and the court of appeals affirmed Appellant's conviction. *Rios v. State*, 626 S.W.3d 408 (Tex. App.—Dallas 2021, pet. granted). This Court granted Appellant's pro se petition for discretionary review on October 27, 2021, and ordered the trial court to determine if Appellant was indigent and was entitled to appointed counsel. (Supp. CR: 1-2). On December 7, 2021, the trial court appointed counsel to represent Appellant in this proceeding.

STATEMENT OF FACTS[1]

A grand jury indicted Appellant for the offense of continuous sexual abuse of a child under fourteen years of age. (CR: 8). On February 28, 2019, Judge Martin Richter, sitting by assignment, conducted a bench trial in the case. (RR2: passim). During the trial, a Spanish interpreter translated for Appellant, who speaks Spanish and very little English. (RR2: 6, 76, 101). The judge asked for any objections to the pretrial motions—there were none. (RR2: 7). The judge then swore in Appellant and a number of witnesses. (RR2: 8-9). The parties invoked the Rule, and the trial court duly instructed the witnesses. (RR2: 8-9). The State then arraigned Appellant. (RR2: 9-10). The judge asked Appellant how he wished to plead, and Appellant entered a plea of not guilty. (RR2: 10). The trial court

[1] The State adopts the statement of facts as recited in the Fifth Court of Appeals' opinion below, with only minor edits and the addition of record citations.

asked the parties if they wished to make opening statements. (RR2: 10). After the parties declined, the trial court directed the State to call its first witness. (RR2: 10).

The record in the case does not include a written waiver of trial by jury and does not reflect that the trial court admonished Appellant of his right to a jury trial. Appellant testified on his own behalf in both the guilt–innocence phase and the sentencing phase of trial. (RR2: 99-111; RR3: 23-25). Neither Appellant nor his counsel made any objection to proceeding with a trial before the court; neither requested a jury trial on the record. At the conclusion of the trial, the trial court found Appellant guilty as charged and sentenced him to thirty-five years in prison. (RR3: 28-29).

The judgment of conviction is titled "Judgment of Conviction by Court—Waiver of Jury Trial," and includes the recitation, "Defendant waived the right of trial by jury and entered the plea indicated above." (CR: 38-39). The case docket sheet includes the notation, "case called to trial – TBC." (CR: 7). The record contains no other reference that Appellant waived his right to a jury trial. Appellant's motion for new trial, which did not complain that he was denied his right to a jury trial, was overruled by operation of law. (CR: 42).

Appellant filed a timely notice of appeal. (CR: 41). On Appellant's motion, the court of appeals abated the case to permit the trial court to conduct a hearing and to make findings of fact and conclusions of law regarding the following issues: (1) whether Appellant executed a written jury waiver; (2) whether Appellant waived his right to a trial by jury; (3) whether Appellant consented to a trial before the court without a jury; and (4) whether the judgment's recitation that Appellant

waived the right of trial by jury accurately reflects the trial proceedings. (Supp. CR1: 41). The current presiding judge of the court, Judge Raquel Jones, conducted evidentiary hearings on October 3, October 25, and November 1, 2019. At the conclusion of the hearings, the trial court made the following findings of fact:

1. A jury waiver executed by Appellant is not in the record.

2. Appellant speaks Spanish. He was provided with a Spanish-speaking interpreter at the three evidentiary hearing dates, through whom he testified.

3. A Dallas County probation assessment officer testified that her presentence investigation (PSI) report notes indicated Appellant told her he did not want to enter an open plea before the presiding judge.

4. Appellant did not tell the probation assessment officer that he wished to have a jury trial.

5. Appellant did not tell the probation assessment officer that he did not wish to have a trial before the court.

6. Appellant testified that he told his trial counsel he wished to have a jury trial.

7. Appellant testified that his trial counsel provided no legal advice to him regarding his right to a jury trial.

8. At the October 3, 2019 hearing, Appellant admitted signing three of the four pass slips found in the Court's file continuing the case for "Trial by the Court," the last of which was a continuance for trial before the court on February 28, 2019.

9. Appellant changed his testimony at the October 25, 2019 hearing, stating that the signature on the last pass slip, State's Exhibit 4, was not his.

10. Appellant's trial counsel testified that he wrote Appellant's signature on State's Exhibit 4 because Appellant did not have his

glasses, and Appellant was aware that counsel was signing for him.

11. Appellant's trial began on February 28, 2019, and concluded on March 1, 2019.

12. Appellant was provided with a Spanish-speaking interpreter at trial, who was sworn in at the beginning of trial.

13. The trial judge did not admonish Appellant of his right to a jury trial on the record.

14. Appellant testified he did not understand that he was being tried for the case on February 28 and March 1, 2019, even though the record reflects that the judge, Appellant's counsel, and the State discussed in open court pre-trial motions that were filed in the case; the trial court arraigned Appellant; Appellant entered a plea of not guilty; witnesses, including the complaining witness, were present to testify; and Appellant testified in his own defense.

15. Appellant testified that he did not ask his trial counsel to object to the trial before the court.[2]

16. The district attorney in the case testified that the case had always been set for a trial before the court.

17. The district attorney in the case testified that the case was never set for a jury trial.

18. The district attorney in the case testified that a reason for conducting a PSI report for a defendant even though he was opting for trial and not entering a plea is to gather information for the judge to consider when assessing his punishment.

19. Appellant's trial counsel testified that he communicated with Appellant before trial using a Spanish-speaking interpreter.

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[2] The State explained in its response brief to the Appellant's brief on direct appeal that the assistant district attorney representing the State at the evidentiary hearings was the same assistant district attorney representing the State in the appeal and who prepared the State's proposed findings of fact and conclusions of law. Appellant's testimony at the evidentiary hearing was that "he did ask" his trial counsel to object; the inclusion of "did not ask" was a typographical error in the State's proposed findings of fact. (Supp. RR1: 23-24). The same assistant district attorney is also the counsel of record in this petition for discretionary review.

20. Appellant's trial counsel testified that he advised his client of his right to a jury trial.

21. Appellant's trial counsel testified that the case had been set for a trial before the court since October 2018.

22. Appellant's trial counsel testified that Appellant was aware that he was having a trial before the court on the day trial started and knew what a trial was.

23. Appellant's trial counsel testified that if he had more time, he would have filed a written jury waiver.

24. This Court finds Appellant's testimony that he was not aware of his right to a jury trial to not be credible.[3]

25. The Court finds Appellant's testimony that he was not aware he was being tried for the offense on February 28 and March 1, 2019 to not be credible.

26. The Court finds Appellant's testimony that he did not voluntarily consent to a trial before the court to not be credible.

(Supp. CR2: 11-13). In addition, the trial court made the following conclusions of law based on the evidence adduced at the hearing:

1. Appellant did not execute a written jury waiver.

2. Appellant waived his right to a trial by jury.

3. Appellant voluntarily consented to a trial before the court without a jury.

[3] The State explained in its response brief that the inclusion of this finding is also a typographical error made by the assistant district attorney and is not supported by the evidence. Appellant was not asked whether he was aware of his right to a jury trial, and never testified that he was not aware of that right. (Supp. RR1: passim; Supp. RR2: passim). Indeed, Appellant concedes in his brief that "the record is clear that Rios was aware of his right to a jury trial[.]" Appellant's Br. at 28.

4. The recitation in the judgment that Appellant waived the right of trial by jury accurately reflects the proceedings, and, other than the incredible testimony of Appellant, the record contains no direct proof of its falsity.

(Supp. CR2: 13-14).

SUMMARY OF THE ARGUMENT

RESPONSE TO APPELLANT'S GROUND FOR REVIEW

The Fifth Court of Appeals was required to apply a *Johnson v. State* harm analysis to Appellant's claims of statutory jury waiver error, and its application of that case in affirming his conviction is not in conflict with other Texas courts of appeals' decisions. *Johnson* also was relevant to answering the question of whether the record contained any evidence of Appellant's express, knowing, and intelligent jury waiver. In addition, *State ex rel. Curry v. Carr*, the case that Appellant argues the court of appeals should have applied, is inapposite to his statutory and constitutional jury waiver error issues. Moreover, the court of appeals properly applied the standard of review for reviewing the trial court's findings of fact and conclusions of law from the abatement hearings which were supported by the evidence.

ARGUMENT

1. *State ex rel. Curry v. Carr* is inapposite to Appellant's issues on direct appeal. The court of appeals was bound to apply *Johnson v. State* to Appellant's jury waiver error issues, and the court's application did not conflict with other Texas courts of appeals' decisions in other cases.

In his stated ground for review, Appellant complains that the court of appeals' application of *Johnson v. State,* 72 S.W.3d 346 (Tex. Crim. App. 2002) conflicts with other courts of appeals' rulings in Texas. He argues that due to the "circumstances" of his case, the court of appeals should have followed *State ex rel. Curry v. Carr*, 847 S.W.2d 561 (Tex. Crim. App. 1992). Appellant's Br. at 5-6. His arguments have no merit.

1.1. *State ex rel. Curry v. Carr* is inapposite to Appellant's case

As an initial matter, *State ex rel. Curry v. Carr,* 847 S.W.2d 561 (Tex. Crim. App. 1992) is inapposite to Appellant's jury waiver issues, and Appellant's argument that the court should have applied it is misplaced. The issue in *Curry* was not the voluntariness of a defendant's jury waiver, but whether the State's consent to a defendant's waiver of a jury trial pursuant article 1.13(a) was applicable to misdemeanor cases. *Id.* at 561. In that case, the defendant, who was being tried for a misdemeanor, wished to waive a trial by jury; however, when the State requested to proceed to a jury trial, the trial court refused to empanel a jury. *Id.* The State filed a writ of mandamus, and this Court determined that a trial court does not have discretion to serve as a factfinder in a misdemeanor case absent the State's consent and approval pursuant to article 1.13(a) and ordered the trial court to set

aside its order denying the State's request for a jury trial. *Id.* at 562. The court in *Curry* was not presented with a question of whether a valid waiver had occurred by either the State or the defendant. Appellant has failed to demonstrate that the court of appeals should have applied *Curry*.

1.2. The court of appeals correctly applied the relevant statutory and constitutional jury waiver caselaw.

1.2.1. Applicable Law

Both the United States Constitution and the Texas Constitution guarantee the right to a trial by jury. U.S. Const. Amend. VI; Tex. Const. art. 1, § 15; *see also* Tex. Code Crim Proc. Ann. art. 1.12. "As a matter of federal constitutional law, the State must establish, on the record, a defendant's express, knowing, and intelligent waiver of jury trial." *Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009). "To constitute an express waiver, there must be an 'intentional relinquishment or abandonment of a known right or privilege.'" *Davidson v. State*, 225 S.W.3d 807, 811 (Tex. App.—Fort Worth 2007, no pet.) (*citing Marin v. State*, 851 S.W.2d 275, 278-79 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)). A defendant's mere acquiescence in proceeding to trial without a jury does not constitute an express waiver. *See Ex parte Lyles*, 891 S.W.2d 960, 962 (Tex. Crim. App. 1995).

Article 1.13(a) of the Texas Code of Criminal Procedure sets out the required formalities of a jury waiver in Texas. *See* Tex. Code Crim. Proc Ann. art. 1.13(a). It provides, in relevant part, that the defendant "shall have the right, upon

entering a plea, to waive the right of trial by jury, conditioned, however, that ... the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state." *Id.* A trial court errs by failing to observe the mandatory requirements of article 1.13. *See id.*; *Johnson v. State*, 72 S.W.3d 346, 347 (Tex. Crim. App. 2002).

Johnson v. State, a 2002 case decided by this Court, stands for the proposition that if the trial court fails to obtain a written jury waiver from a defendant in a case pursuant to article 1.13(a), statutory error occurs. 72 S.W.3d at 348. "Because neither the state nor the federal constitution requires that this waiver be written, a violation of this aspect of Article 1.13(a) constitutes a statutory error rather than a constitutional error." *Hinojosa v. State*, 555 S.W.3d 262, 265-66 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) (citing *Johnson*, 72 S.W.3d at 348). When such error occurs, appellate courts assess harm pursuant to Texas Rule of Appellate Procedure 44.2(b). *See* Tex. R. App. P. 44.2(b); *Johnson*, 72 S.W.3d at 348. Such statutory error warrants application of a Rule 44.2(b) harm analysis, and the defendant suffers no harm if the record reflects that he was aware of his right to a jury trial and opted for a bench trial. *Johnson*, 72 S.W.3d at 349.

In *Johnson*, the Court examined as part of its harm analysis whether the recitation in the judgment, "Waiver of Jury Trial," was false. *Id.* The court of appeals properly laid out the law regarding proof of falsity in the judgment as follows:

> In *Johnson*, the Court of Criminal Appeals held that the lack of a written jury waiver is not harmful if the record in another way

> reflects that the defendant was aware of, and waived, his right to a jury trial. *Johnson*, 72 S.W.3d at 349. Like the judgment in appellant's case, the judgment in *Johnson* recited that the defendant had "waived trial by jury." *See id.* Use of the term "waive" presumes knowledge because "to waive a right one must do it knowingly—with knowledge of the relevant facts." *Id.* (citing BLACK'S LAW DICTIONARY 1276 (7th ed. abridged 2000)). "Waiver" is defined as the "act of waiving or intentionally relinquishing or abandoning a known right, claim or privilege." *Id.* (citing WEBSTER'S THIRD INT'L DICTIONARY 2570 (1966)). The *Johnson* court reasoned that such a recitation of a waiver of jury trial is "binding in the absence of direct proof of [its] falsity." *Id.* (citing *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g)). Without such direct proof, the appellant cannot overcome the presumption of regularity in the judgment. *See id.*

Rios, 626 S.W.3d at 414.

When a trial court fails to obtain any jury waiver at all, the court commits structural constitutional error that affects the very framework of the underlying trial. *Davidson v. State*, 225 S.W.3d 807, 811 (Tex. App.—Fort Worth 2007, no pet.) (*citing Loveless v. State*, 21 S.W.3d 582, 584 (Tex. App.—Dallas 2000, pet. ref'd), *abrogated on other grounds by Johnson*, 72 S.W.3d at 348). Accordingly, when a defendant raises a constitutional complaint on appeal regarding jury waiver, the reviewing court considers whether the State established, on the record, the defendant's express, knowing, and intelligent waiver of a jury trial. *Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009).

1.2.2. Application

On direct appeal, Appellant raised claims of both statutory and constitutional violations of his right to a jury trial. Appellant conceded in his brief that he was aware of his right to a jury trial. *Rios*, 626 S.W.3d at 415 n.8 ("The record is clear that Rios was aware of his right to a jury trial.").

1.2.2.1. Appellant's Issues One and Five[4] on Direct Appeal: The court of appeals applied *Johnson* to Appellant's statutory jury waiver error claim and falsity of the judgment claim in a manner that does not conflict with other Texas courts of appeals.

Because Appellant raised a statutory jury waiver error claim on direct appeal urging that he was harmed by the trial court's failure to obtain a jury waiver pursuant to article 1.13(a), the court of appeals was bound to follow the precedent in *Johnson* in assessing harm when addressing that issue. *See* Tex. Const. art. 5, § 5(a) (providing that the court of criminal appeals is the final authority for interpreting criminal law in Texas). In addition, Appellant's falsity of the judgment claim was part and parcel of the *Johnson* analysis. *See Johnson*, 72 S.W.3d at 349.

Here, the State conceded that the trial court erred by failing to observe the mandatory requirements of article 1.13(a). *See* Tex. Code Crim. Proc. Ann. art. 1.13(a). As part of its analysis in determining whether Appellant was harmed by the error pursuant to Rule 44.2(b), the court of appeals relied on *Johnson* as have other Texas courts of appeals. *Rios*, 626 S.W.3d 413-14 (citing *Jackson v. State*, 76

[4] Appellant's fourth issue on direct appeal, that he did not consent to a bench trial, is subsumed in his remaining issues.

S.W.3d 798, 803 (Tex. App.—Corpus Christi 2002, no pet.) (finding no harm per *Johnson* where the judgment indicated the appellant waived his right to a jury trial and there were "several continuances and re-settings for the bench trial"); *Levy v. State*, No. 14-16-00846-CR, 2017 WL 3403601, at *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2017, pet. ref'd) (mem. op., not designated for publication) (holding the appellant was aware of his right to a jury trial and opted for a bench trial where the judgment recited the defendant waived a jury trial and the record contained multiple case reset forms signed by the appellant indicating "type of setting" was court trial)).

After reviewing the records from the trial and the abatement hearings, the court of appeals analyzed Appellant's statutory claims, properly deferred to the trial court's findings of fact, and concluded that Appellant was not harmed by the trial court's failure to observe the requirements of article 1.13(a) that a defendant waive his right to a jury trial in person, in writing, and in open court. *Rios*, 626 S.W.3d at 416. In addition, the court determined that Appellant failed to bring forth sufficient evidence to establish the falsity of the recitations in the judgment. *Rios*, 626 S.W.3d at 417 (*citing Johnson*, 72 S.W.3d at 349 ("We must presume that statement [of jury waiver] correct in the absence of direct proof of its falsity.")). This was not an incorrect or conflicting application of *Johnson*.

1.2.2.2. Appellant's Issues Two and Three on Direct Appeal: The court of appeals applied the relevant caselaw to Appellant's constitutional jury waiver error claims in a manner that does not conflict with other Texas courts of appeals.

Although the *Hobbs* issue of "whether the State established, on the record, appellant's express, knowing, and intelligent waiver of a jury trial" was the ultimate question in reviewing Appellant's constitutional complaint of "no jury waiver at all," *Johnson* nonetheless applies, as the court's *Johnson* no-harm analysis in Appellant's statutory claim was also relevant to answering the constitutional question of whether the record contains evidence of Appellant's express, knowing, and intelligent waiver. *See Hinojosa,* 555 S.W.3d at 265-66 (citing *Hobbs*, 298 S.W.3d at 197) (applying *Johnson* in its analysis of the appellant's constitutional jury waiver issue to determine whether the record contained evidence of the truth of the judgment in determining whether the appellant knowingly and intentionally waived his right to a jury trial).

Even had Appellant only raised a no-waiver-at-all constitutional complaint, the court of appeals' opinion reflects that it still would have affirmed Appellant's conviction. Importantly, in conducting its analysis, the court thoroughly examined the trial record, the abatement hearing records, and the trial court's factual findings and distinguished Appellant's case from *Davidson v. State*, a case with a similar procedural history and similar statutory and constitutional jury waiver issues on appeal. 225 S.W.3d at 808. Unlike Appellant's case, the *Davidson* trial record and the trial court's findings made after the abatement hearing supported the appellant's statutory and constitutional complaints. *Id.* at 809-11.

The court also cited to an unpublished Eighth Court of Appeals case with a similar procedural history and determined that "the evidence in the record and the trial court's factual findings show that appellant was aware of his right to a jury trial, waived that right, and opted for a bench trial … [.]" *Rios*, 626 S.W.3d at 416-17 (citing *Snider v. State*, No. 08-12-00050-CR, 2013 WL 6671510, at *2 (Tex. App.—El Paso Dec. 18, 2013, pet. ref'd) (not designated for publication) (also distinguishing *Davidson* because the evidence at the abatement hearing established that the defendant was aware of her right to a jury trial and voluntarily waived it)).

1.2.3. Conclusion

State ex rel. Curry v. Carr is inapposite to Appellant's case. Appellant raised statutory jury waiver issues, and the court of appeals was bound to apply *Johnson* to those claims. In addition, *Johnson* was nonetheless applicable to the court of appeals' analysis of Appellant's constitutional jury waiver claims. The record 1) contains evidence demonstrating that under a *Johnson* harm analysis for Appellant's statutory claims, he was not harmed by the lack of a written or oral jury waiver, and 2) contains evidence that Appellant expressly, knowingly, and intelligently waived his right to a jury trial and did not suffer a constitutional violation. Appellant has failed to demonstrate that the court of appeals applied the applicable law to Appellant's statutory and constitutional jury waiver issues in a manner that conflicts with other Texas courts of appeals' decisions.

1.3. The court of appeals applied the standard of review for reviewing a trial court's findings of fact and conclusions of law in a manner that does not conflict with other Texas courts of appeals' decisions, and Appellant's argument calls upon it to do otherwise.[5]

As part of the "circumstances" of his case, Appellant claims that, among other things, unanswered questions and conflicts in the evidence at the abatement hearings, a language barrier, and the two errors in the trial court's findings of fact that were not supported by the evidence "should cause any reviewing court to give the trial court's findings closer scrutiny and certainly to withhold 'total deference'" to the trial court's findings of fact and conclusions of law. Appellant's Br. at 10. Appellant's argument that the court of appeals should have applied a different, less deferential standard of review to the trial court's findings of fact and conclusions of law conflicts with the decisions of other Texas courts of appeals.

1.3.1. Applicable Law

The court of appeals correctly set forth the applicable standard of review for reviewing a trial court's findings of fact and conclusions of law as follows:

> As a general rule, appellate courts "afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We use the same deferential

[5] Although Appellant's pro se PDR did not explicitly state this ground for review, it is a major part of Appellant's underlying argument in his PDR. Further, in briefing Appellant's stated ground of review, Appellant's appointed counsel has adopted his unstated ground of review in making the argument that *State ex rel. Curry* is the applicable caselaw. In the interest of justice, the State responds to the unstated ground as part and parcel of his stated ground for review.

> standard in "reviewing a trial court's application of law to the facts or to mixed questions of law and fact, especially when the findings are based on credibility and are supported by the record." *Miller v. State*, 393 S.W.3d 255, 262-63 (Tex. Crim. App. 2012). "When the trial court makes explicit findings of fact, we consider, in the light most favorable to the trial court's ruling, whether the record supports those findings." *Id.* (citing *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)); *see Reece v. State*, No. 01-14-00484-CR, 2015 WL 7300098, at *4 (Tex. App.—Houston [1st Dist.] Nov. 19, 2015, no pet.) (mem. op., not designated for publication) (applying this deferential standard of review to trial court's findings of fact and conclusions of law following abatement hearing). We review legal rulings de novo unless the trial court's findings that are supported by the record are dispositive. *Miller*, 393 S.W.3d at 263.

Rios, 626 S.W.3d at 413.

A trial court's findings of fact must be supported by the record. *See Miller,* 393 S.W.3d at 263. If they are not, the reviewing court may disregard those findings as unsupported by the record. *Id.* "The recurring requirement in each of these standards of review is that deference is due only if the trial court's rulings are supported by the record." *Id.* Hence, the trial court, the factfinder in an abatement hearing and who is present during the testimony of the witnesses, is in the best position to see the witnesses, hear their intonation, observe their demeanor, and determine their credibility. *See Meekins v. State*, 340 S.W.3d 454, 461 n.32 (Tex. Crim. App. 2011) ("Determinations of witness credibility are left entirely to the fact finder, who is in the unique position to observe the witness' body language, demeanor, tone of voice, and other indicia of credibility.").

1.3.2. Application of Law to Facts

Both Appellant and the State submitted proposed findings of fact and conclusions of law to the trial court and, with the assistance of his appellate counsel, Appellant had the opportunity to review the State's proposed findings and conclusions before the trial court signed them; however, he made no objections to them. (Supp. RR3: 19-20). In addition, when the State pointed out the two findings not supported by the evidence in its response brief to Appellant's brief on direct appeal, Appellant made no objection or response to them at that time. *Rios,* 626 S.W.3d at 411-12 and n.6. Appellant did not raise any issues in his brief regarding the sufficiency of the evidence to support the trial court's findings and conclusions. In fact, as pointed out by the court of appeals in its opinion, aside from including the findings and conclusions in the statement of facts in his appellate brief, Appellant completely ignored them when making his jury waiver arguments. *Id.* at 413.

Without citing to any caselaw to support his position, Appellant argues that because two of the findings were not supported by the evidence, the court of appeals should have reviewed the trial court's findings "with more scrutiny" and "withhold total deference." Appellant's Br. at 10. A reading of the court of appeals' majority opinion, concurrence dubitante, and dissent, however, reflects that the court did, indeed, closely scrutinize the trial court's findings and conclusions. The concurring and dissenting justices voiced concerns about the trial court's findings, particularly because Appellant was a native Spanish speaker who spoke and read little English. *Rios*, 626 S.W.3d at 418, 420 (Burns, J., concurring) and 424, 427

(Goldstein, J., dissenting). The record and the findings, however, reflect that Appellant's counsel met with him with a Spanish-speaking interpreter before trial, and a Spanish-speaking interpreter translated for him at trial and at the abatement hearings. Appellant made no complaint about the competence of his interpreters. While the concurring justice afforded the appropriate deferential standard to the trial court's findings, the dissenting justice, who was not present at the abatement hearings, found Appellant's testimony to be credible and would choose to depart from the applicable standard of review. *Rios*, 626 S.W.3d at 428 (Goldstein, J., dissenting). The dissent's position, including the view that "the record does not reflect any lie or dishonesty by [Appellant]," in part fails to recognize the salient fact that the trial court, who was present at the abatement hearings, was in the unique position to observe the body language, demeanor, and inflection of the testifying witnesses, and was in the best position to judge their credibility when making its findings of fact. *See Meekins*, 340 S.W.3d at 461 n.32. The cold record cannot reflect these important details.

The majority afforded the appropriate deference to the trial court's findings of historical fact. The court of appeals disregarded the two findings that were not supported by the record and applied the appropriate deferential standard of review as have other Texas courts of appeals in similar cases. *See Rios*; 626 S.W.3d at 413, 416 (citing *Miller*, 393 S.W.3d at 263 (deferring to the trial court's findings from a suppression hearing, but disregarding certain findings that were not supported by the record)); *see also Snider*, 2013 WL 6671510, at *2; *Reece*, 2015 WL 7300098, at *4 (applying the same deferential standards of review to the trial court's findings

of fact and conclusions of law following an abatement hearing in a case where the appellant's right of appeal was at issue).

Appellant's argument that his case called upon the court of appeals to apply a less deferential standard of review to the trial court's findings of fact and conclusions of law departs from and conflicts with the applicable caselaw. Moreover, the court of appeals' application of the standard of review for deferring to the trial court's findings of fact and conclusions of law did not conflict with other courts of appeals' applications, and the trial court's findings of fact and conclusions of law were supported by the evidence. This Court should overrule Appellant's ground for review.

PRAYER

The State prays that this Honorable Court affirm the judgment of the Fifth District Court of Appeals and affirm Appellant's conviction.

Respectfully submitted,

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